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No. 889

IN THE

# SUPREME COURT OF THE UNITED STATES

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W. S. ROGERS, ET AL, ..... *Appellants*

v.

CITY OF PINE BLUFF, ARKANSAS, ..... *Appellee*

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## JURISDICTIONAL STATEMENT

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*For Appellants.*

PARAGON PRINTING CO. LITTLE ROCK

IN THE

# SUPREME COURT OF THE UNITED STATES

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W. S. ROGERS, ET AL., *Appellants*

v.

CITY OF PINE BLUFF, ARKANSAS, *Appellee*

---

## JURISDICTIONAL STATEMENT

(a) The opinion of the court in the cause from which this appeal is taken is reported in 237 Arkansas 117 (not yet in volume form), 372 S.W. (2) 620, The Law Reporter, No. 4, p. 117, October 28, 1963.

(b) The original proceeding was predicated on annexation by appellee of property on the periphery of Pine Bluff, Arkansas, on which appellants resided. Annexation was undertaken under Ark. Stat's. §19-307, by the terms of which the inhabitants of the territory to be annexed are provided no vote at the election on which the issue of annexation is submitted to the populace, but are bound by a majority vote of the electorate of the city desiring annexation.

(ii) The opinion of the Arkansas Supreme Court was rendered and judgment entered October 28, 1963. Rehearing was sought and denied December 16, 1963. Notice of appeal was filed January 8, 1964, in the Arkansas Supreme Court.

(iii) This court has jurisdiction under 28 USCA §1257(b), the constitutionality of Ark. Stat's §19-307 being challenged as a denial of equal protection, prohibited by Amendment 14 to the Constitution of the United States.

(iv) Cases sustaining jurisdiction are:

*Baker* v. *Carr*, 369 U.S. 186, 7 L. Ed (2) 663, 82 S. Ct. 691

*Gray* v. *Sanders*, 372 U.S. 368, 9 L. Ed. (2) 821

(v) The text of Ark. Stat's §19-307 is:

*Annexation proceedings by municipality — Election — Petition — Procedure.* — When any municipal corporation shall desire to annex any contiguous territory thereto, lying in the same county, whether containing one [1] or more judicial or fiscal districts, it shall be lawful for the governing body of said municipal corporation to submit the question to the qualified electors at least one [1] month before the annual election, or at a special election to be called for that purpose. If a majority of the votes cast on that question shall be in favor of annexation, the said corporation shall present to the County Court a petition praying for such annexation. The like proceeding shall be had on said petition as is prescribed in thirty-fifth (35), thirty-sixth (36) and thirty-seventh (37) sections (19-101—19-103) of this act, so far as same may be applicable, and if within thirty (30) days after a transcript shall be delivered as provided, no notice of a complaint against such annexation shall be given, at the end of said thirty (30) days (and in case of any such complaint, then after the end of thirty (30) days after the dismission of said complaint), the territory shall, in law, be deemed and taken to be included in and shall be a part of said corporation, and the inhabitants thereof shall, in all respects, be citizens thereafter

> of said municipal corporation, and the County Clerk shall make out and certify to the governing body of said municipal corporation and the Secretary of State the transcripts provided for in the preceding section.

(c) The question presented by this appeal: Is a state statute which permits annexation of territory adjoining a municipal corporation on majority vote of inhabitants of the corporation, without the privilege of voting by inhabitants of the territory to be annexed, a denial of equal protection of law within the scope of Amendment 14 to the Constitution of the United States?

(d) This action originated as an annexation proceeding under which property adjoining Pine Bluff, Arkansas, was incorporated into the city. The Arkansas Statute under which the proceeding was held provides that annexation is accomplished by presentation of the proposition at an election in which inhabitants of the city are permitted to vote and the inhabitants of the territory sought to be annexed are not. A vote favoring annexation was taken and the annexed inhabitants protested through the Arkansas Supreme Court, which found the proceeding valid. The question of constitutionality of the statute, under the Fourteenth Amendment, was raised in the petition for rehearing, which was overruled (R.10, 19).

Appellants recognized that they have a heavy burden in this court. Their insistence that annexation at an election in which they are not entitled to vote is an obvious denial of equal protection has been decided adversely in *Hunter* v. *City of Pittsburgh* (1907), 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151. Furthermore, the Arkansas statute challenged here was previously the subject of an appeal to this court in *Marsh* v. *City of El Dorado*, 233 S.W.

(2) 536, 217 Ark. 838, appeal dismissed 71 S.Ct. 507, 340 U.S. 940, 95 L. Ed. 678. In *Marsh*, however, the issue was not presented on the same basis as here, it being contended that the statutory provision that a favorable vote was *prima facie* evidence of a valid annexation was a denial of due process. This was found not to involve a federal question of substance.

Appellants recognize the difficulty presented by these decisions, but suggest that recent emphasis on the right to vote, as indicated by decisions of this court in Baker, Gray and the case decided February 17, 1964, requiring equal representation in congressional districts, based on population, have cast a new light on such decisions as Hunter.

Hunter is predicated on the reasoning that cities are political subdivisions of the states, subject to plenary control, expansion, contraction, or even abolition. It is stated, in effect, that since the state legislatures have such complete control over cities it is not necessary that the inhabitants of an area sought to be annexed have any right to vote on the proposition. It is assumed that the inhabitants whose property is absorbed have a remedy in that they may vote on their legislative representatives, who have the ultimate power.

This is true so far as is goes, but the flaw is in permitting the inhabitants of the city to vote to annex, when a corresponding right is denied the affected citizens in the territory under consideration. Were the matter left exclusively in legislative hands, no disparity would exist, but when one segment of the populace is permitted to vote, and their vote materially affects others similarly situated, those denied the right of expression have a degree of protection far less than equal.

(e) The question presented is one that will recur as America's population expands and becomes increasingly urban. As matters now stand, the scales are weighted exclusively on the side of the city. Many states have statutes similar to Arkansas', though many have seen fit to temper power with concessions to the annexed inhabitants by permitting them to vote, as well as those who desire annexation. Substance of constitutional issues is a difficult term to define. Where the hundreds of inhabitants of the territory annexed to Pine Bluff are concerned, it is a question of supreme importance. Since the same power can presently be exercised by any state, it is a matter of considerable concern, universally. Denial of opportunity to vote on any proposition that materially affects the welfare of the electorate is simply repugnant to the deeply held convictions of many citizens, who regard control over their future as a guaranteed right in or form of government. If the need of cities to expand is pressing, it must be met, but this should not be at the expense of depriving those affected by expansion of any voice in the matter.

(h) Appended is a copy of the opinion of the Arkansas Supreme Court and (i) a copy of the judgment entered thereon.

ROGERS V. CITY OF PINE BLUFF.
5-3085

Opinion delivered October 28, 1963.

Appeal from Jefferson Circuit Court, *Henry W. Smith*, Judge; affirmed.

*Griffin Smith*, for appellant.

*George N. Holmes* and *John Harris Jones*, for appellee.

PAUL WARD, Associate Justice. This appeal comes from an order of the circuit court approving the annexation of certain lands to the City of Pine Bluff. The lands consist of 7.52 square miles which lie east, south and west of and are contiguous to said city.

The annexation proceedings were commenced with the filing of a petition by the City on November 20, 1961, and subsequent steps taken, all pursuant to Ark. Stat. Ann. §19-307 (Repl. 1956) and related sections. There is no contention here that all procedural steps pursuant to all applicable statutes were not taken by the City and the county.

The only point relied on by appellants for a reversal is that "the territory sought to be annexed is unreasonably large". In support, and as a basis of their contention, appellants rely heavily upon our holdings and announcements in the cases of *Vestal* v. *Little Rock*, 54 Ark. 321, 15 S.W. 891 and *Cantrell* v. *Vaughn*, 228 Ark. 202, 306 S.W. 2d 863. It appears to be appellants' contention that the trial court failed to follow the fundamental rules applicable to annexation cases as laid down in the *Vestal* case. There it was said:

". . . city limits may reasonably and properly be extended so as to take in contiguous lands, (1) when they are platted and held for sale or use as town lots, (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owners, (3) when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary, (4) when they are needed for any proper town purposes, as for the extension of its streets, or sewer, gas or water system, or to supply places

for the abode or business of its residents, or for the expansion of needed police regulation, and (5) when they are valuable by reason of their adaptability for prospective town uses . . . "

Applying the above general rules to the testimony introduced at the trial court we think this case must be affirmed. The record shows that the lands proposed for annexation are divided into four separate areas. Area 1 lies east of the city; Area 2 is southeast of the city; Area 3 lies south and west of the city; and, Area 4 lies northwest of the city. Appellants, in support of their position, contend that "A substantial portion of the proposed annexation represents property not settled nor adaptable for settlement"; and that "The city did not demonstrate ability to furnish services to an area of this magnitude." With these contentions of appellants in mind, we can more easily understand the weight and relevancy of the testimony by relating it to each separate Area.

*Area 1.* One witness stated that eight new industries would be brought into the city with annexation—naming them; a realtor said one acre was sold for $2,400 and that he has lands listed for $2,000 per acre. The city planner said 25% is industrial. No landowner is objecting.

*Area 2.* One witness said 50% was built up—part in modern homes; the city engineer said there were 2,152 people on 1,000 acres, and that a drainage bottleneck affects the present city limits. No landowner is objecting to annexation.

*Area 3.* A realtor said this area has no value for agricultural purposes; that the Chamber of Commerce

paid $1,000 per acre for a development site—and it is one of three industrial sites available for the city; many new homes are being built; the population is 2,642 for 1,405 acres; it will be provided with sewer facilities—one of the worst problems at present. There is a new school, and building lots sell for $1,250 to $2,000 each. For farm purposes the land is not worth more than $100 per acre but is worth many times that price for building and industrial purposes.

*Area 4.* This area is known as Dew Drop, and appellants say it is a "self-sufficient, unitary community which has worked out its own destiny—that it is economically, geographically and politically an entity", and that it has practically no affinity to Pine Bluff. There is, however, testimony to the contrary. One witness who lives there said it was a part of Pine Bluff. There was testimony (by appellants) that part of the Area was known as College Heights to Pine Bluff; that some get mail addressed to Pine Bluff and some have telephone, gas and electricity from Pine Bluff distribution centers; they use the Pine Bluff telephone exchange with no toll charges; and, most of the people are employed in Pine Bluff.

It would serve no useful purpose to detail more of the voluminous testimony. Suffice to say there was testimony to the effect that Pine Bluff was financially able to furnish the annexed areas all necessary utilities as well as fire and police protection, and that it would do so.

In the *Vestal* case, *supra*, it was also pointed out that annexation should be ordered: "In all cases, however, where actual unity is practicable, legal unity should

be ordered as promising the greatest aggregate of municipal benefits." In this connection it is pertinent to note the trial court made the findings:

"'That the territory sought to be annexed is already part of the Pine Bluff community in practice. All that remained to be done was annexation. The territory . . . is an outgrowth of the City of Pine Bluff and after annexation will make up a homogeneous city.'"

Other interesting and pertinent findings of facts, set out below, were made by the trial court:

"The property values in the territory sought to be annexed show that the lands are valuable for city use or for adaptability for prospective town use rather than for use or adaptability for use for agricultural purposes.

"The population in the area sought to be annexed is approximately 7,500. In what has been described in the testimony as area four or the Dew Drop area over 2,000 people now live which is more people than live in the county seats of Rison, Star City or Arkansas City.

"The territory sought to be annexed is needed for proper town purposes, the extension of streets, sewer system, gas and water and to provide residences and the City's need for business expansion. Pine Bluff is expanding and expanding rather rapidly.

"The area sought to be annexed is very much in need of police regulation."

We have uniformly held that the order of the circuit court (in annexation cases) will be upheld if it is supported by substantial evidence. See: *Barton* v. *City of*

*Fort Smith*, 214 Ark. 516, 216 S.W., 2d 884; *Mann* v. *City of Hot Springs*, 234 Ark. 9, 350 S.W. 2d 317; and the *Cantrell* case, *supra*, relied on by appellants. Also, the burden was on appellants to show the lands should not be annexed. *Dodson, et al.* v. *Mayor and Town Council, Fort Smith*, 33 Ark. 508.

Since we are unable to say the order and findings of the trial court were not supported by substantial evidence, the same are affirmed.

Affirmed.

HARRIS, C. J., and JOHNSON, J., not participating.

IN THE SUPREME COURT OF ARKANSAS

October Term 1963 — October 28, 1963

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W. S. ROGERS ET AL., ..... *Appellants*

v. Appeal from Jefferson Circuit Court

CITY OF PINE BLUFF ..... *Appellee*

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JUDGMENT

The cause came on to be heard upon the transcript of the record of the circuit court of Jefferson County, and was argued by counsel; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is, therefore, considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellants all its costs in this Court, in this cause expended, and have execution thereof. HARRIS, C. J., and JOHNSON, J., not participating.

October 28, 1963.

Respectfully submitted,

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CITY OF PINE BLUFF, ARKANSAS ..... *Appellee*

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## APPELLEE'S MOTION TO DISMISS

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## MOTION TO DISMISS APPEAL

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Appellee moves for dismissal of the appeal upon the following grounds:

1. The appeal does not present a substantial federal question;

2. The appeal is not within the jurisdiction of this Court, because not taken in conformity to statnte;

3. The federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; and

4. The judgment rests on an adequate non-federal masis.

## BRIEF ON MOTION TO DISMISS APPEAL

*1. The Appeal Does Not Present a Substantial Federal Question.*

Appellants challenge a statute of the State of Arkansas under which the City Council of the City of Pine Bluff does not have authority to petition for annexation until the question has been submitted to and approved by the City's electorate. The election is merely a referendum required before the City may proceed in County Court for annexation. This restriction on the power of the City Council is now urged by appellants as a deprivation of equal protection to the inhabitants of the area described in the petition for annexation.

The statute states the effect of the election as follows:

> " • • • If a majority of the votes cast on that question shall be in favor of annexation, the said corporation shall present to the County Court a petition praying for annexation. • • • "
> Ark. Stats. § 19-307.

Despite the clear language of the challenged statute, appellants have presented the following confusing comments:

> " • • • under Ark. Stats. §19-307 by the terms of which inhabitants of the territory to be annexed are provided no vote • • • but are *bound by a majority vote of the electorate of the city* desiring annexation."
>
> (Jurisdictional Statement (b) p. 1, emphasis added.)

> " • • • a state statute which permits annexation of territory on majority vote of inhabitants of the corporation • • • .

> "(d) * * * The Arkansas Statute * * * provides that *annexation is accomplished* by presentation of the proposition at an election in which inhabitants of the city are permitted to vote and the inhabitants of the territory sought to be annexed are not. * * *
>
> "* * * *annexation at an election* in which they are not entitled to vote is an obvious denial of equal protection * * *."
>
> (Jurisdictional Statement p. 3, emphasis added.)

If the Jurisdictional Statement is stripped of these erroneous descriptions of the election, it appears to offer no substantial question.

At page 4 of their Jurisdictional Statement, appellants concede: "Were the matter left exclusively in legislative hands, no disparity would exist * * *."

It would appear equally true that since the matter is left exclusively for judicial determination, no disparity exists.

In the first case which arose under the annexation law, *Dodson* v. *Fort Smith* 1878, 33 Ark. 508, the Arkansas Supreme Court stated that annexation was under the control of the legislature which had required the approval of the County Court:

> "* * * It might have made the creation and enlargement of towns depend upon other formalities than the assent of the County Court, * * * but * * * *it has made the assent and judgment of the County Courts necessary* * * *."
>
> 33 Ark. 508, 514, emphasis added.

The Court added that on appeal to the Circuit Court the matter was heard *de novo*, where the Circuit Court exercises "the same discretion which the County Court might have done originally." 33 Ark. 508, 515.

This procedural interpetation has been uniformly followed up to and including the present decision in this case in the Arkansas Supreme Court. The vote of the electors within the municipal corporation does not determine that the annexation shall be made. The determination of the merits of annexation is for the County Court with right of appeal and trial *de novo* in the Circuit Court.

The section of the Arkansas Statutes challenged by this appeal was a part of Act 1 of March 9, 1875, the first enactment of the 1875 legislature prescribing a general body of law relating to municipal government following the adoption of the 1874 Arkansas Constitution. The Act is still basic to municipal government in Arkansas; it now comprises 124 sections of the current Arkansas Statutes. (8 Ark. Stats. p. 1129.)

Ark. Stats. §19-307 was section 84 of the 1875 Act. It adopted by reference sections 35, 36 and 37 of the same Act (Ark. Stats. §§ 19-101—103) which set forth the procedure for incorporation of a city. Under Ark. Stats. § 19-103 it is for the County Court to determine whether the procedural requirements have been met and that the annexation is "right and proper".

*Vestal* v. *Little Rock*, 54 Ark. 321, 15 S.W. 894, is the leading Arkansas case on standards to be applied in determining whether the annexation is "right and proper". The opinion of the Arkansas Supreme Court followed the same rules in the present decision. (Jurisdictional Statement p. 6 ,Opinion.)

Appellants offer no contention that the standards to be applied and the procedures to be followed are unreasonable or discriminatory other than the erroneous construction whoch they have placed upon the election which is only a preliminary procedural step.

Appellants rely on *Baker* v. *Carr* and *Gray* v. *Sanders* to sustain jurisdiction. These cases on voting rights are so remote from the present situation that we should not burden this brief by comparison. Here, the only election involved was the referendum to the electorate of the City whether its voters would authorize the assumption by the City of new responsibilities in petitioning the County Court for annexation. Upon annexation of the new territory, "the inhabitants thereof shall, in all respects, be citizens thereafter of said municipal corporations". Ark. Stats. § 19-307. Such citizenship includes full voting rights.

Appellants mention *Hunter* v. *City of Pittsburgh* (1907), 207 U.S. 161, 28 S.Ct. 40 52 L. Ed. 151, which permitted the statute to stand even though it made the election decisive as to annexation:

> " • • • If the election shows a majority of the votes cast to be in favor of consolidation, the court 'shall enter a decree annexing and consolidating the lesser city • • • with the greater city.'"
> 28 S.Ct., 40, 45.

*Gomillion* v. *Lightfoot* (1960), 364 U.S. 339, 81 S. Ct. 125, 5 L.Ed. 110, limited the broad language of Hunter as to unrestricted power of the States to control the areas of political subdivisions:

> " • • • Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. • • • "

364 U.S. 339, 344-345, 81 S.Ct. 125, 129.

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. * * * "

364 U.S. 339, 347, 81 S.Ct. 125, 130.

Appellants do not even suggest that the annexation created any discriminatory result or was designed to deprive anyone of a constitutional right. Their only objection is that they were not allowed to vote in the election in which the City Council was authorized by its electorate to petition for annexation.

In the absence of any discriminatory or other unconstitutional use of the State's power to prescribe the means by which political boundaries may be aligned, the procedural requirements for annexation to a political subdivision would appear to involve no federal question.

By judicial construction the vote of the city for annexation is held to make a *prima facie* case for annexation. As appellants mention (Jurisdictional Statement (d) p. 3) this construction of the statute was challenged on a constitutional basis in *Marsh* v. *El Dorado*, 233, S.W. 2d 536, 217 Ark. 838, in which the appeal was dismissed "for the want of a substantial federal question." 340 U.S. 940, 71 S. Ct. 507, 95 L.Ed. 678.

This allocation of burden of proof is more than offset by the rule that if the trial court finds that "any material portion of the proposed territory should not be annexed", the entire annexation may be denied. *City of Newport* v. *Owens*, 211 S.W. 2d 438, 439, 213 Ark. 513,

citing *City of Pine Bluff* v. *Mead*, 177 Ark. 809, 7 S.W. 2d 988, 989, and *Vestal* v. *City of Little Rock*, 54 Ark. 321, 15 S.W. 91, 16 S.W. 291, 292.

For example, in *City of Little Rock* v. *Findley*, 1954, 224 Ark. 305, 272 S.W. 2d 823, the City's petition to annex 2,944 acres was granted in the county court but rejected on appeal to the circuit court for the reason that it included an estimated 120 to 300 acres of lowlands bordering a stream which were subject to flooding and used only for pasture. In affirming the denial of annexation, the Arkansas Supreme Court stated:

> " * * * a petition like this one is properly rejected if only a part of the contemplated addition fails to meet the requirements for inclusion within the municipality; * * * ."
>
> 272 S.W. 2d 823, 824.

As a practical matter, the City of Pine Bluff in presenting its case for annexation assumed the burden of going forward with the evidence of its need for expansion, accuracy of its plat and description, nature of the area to be annexed, need for municipal services in the area sought to be annexed, and the City's ability to provide such services. The transcript of proceedings in the trial court, approximately 900 pages, was largely devoted to testimony of witnesses called by the City to develop such proof.

Annexation law in Arkansas is heavily weighted in favor of those protesting the annexation.

"Any person interested" may contest the annexation. Ark. Stats. §19-102; *Dodson* v. *Fort Smith*, 33 Ark. 508, 510. The named appellant, Mr. Rogers, is not even required to be a landowner in the area sought to be annexed.

Appeal is granted as a matter of right from the County Court to the Circuit Court and from there to the Arkansas Supreme Court. Ark. Stats. §§ 19-105, 307. Annexation is not effective until 30 days after dismissal of the complaint against annexation, Ark. Stats §19-307, in this case 30 days after decision on appeal, which was more than two years after the election and filing of the petition for annexation. Thus any one remonstrant may withhold the benefits of annexation from his neighbors even though the County Court, Circuit Court and Arkansas Supreme Court find no merit in his contentions.

The special census by the Census Bureau showed the population of the annexed area, as of February 10, 1964, to be 9,610. Despite the objections of appellant, the other inhabitants are entitled to municipal police, fire, sanitation and other services, reduction of insurance rates, and the other benefits accruing from annexation.

As this is written the City of Pine Bluff is ready to let a contract for construction of a fire station in the annexed areas and the other citizens of Pine Bluff are the City may proceed without peril to make such capital improvements.

Annexation was delayed nearly two years by appeals in the State courts. Appellants have taken full advantage of all procedural rights granted in, or adopted by reference in, the challenged statute. Whether at the conclusion of their appeals appellants should be permitted to inject a new issue is a procedural question which should be determined by Arkansas law. The residents of the annexe dareas and the other citizens of Pine Bluff are also entitled to equal protection of the procedural laws which appellants have so skillfully used in delaying annexation.

The requirement of the Arkansas statute that an election be held prior to the filing by a citizen of a petition for annexation does not present a federal question.

2. *The Appeal is Not Within the Jurisdiction of This Court, Because Not Taken in Conformity to Statute.*

3. *The Federal Question Sought to Be Reviewed Was Not Timely or Properly Raised and Was Not Epressly Passed on.*

The two points will be discussed together to avoid repetition,

Appellants appeal under 28 USC §1257(2) which requires a decision by the highest court of the State in favor of validity of the statute challenged as repugnant to the Constitution of the United States.

However, the question of constitutionality of the statute was not raised until appellants' petition for rehearing in the Arkansas Supreme Court. (Jurisdictional Statement (d) p. 3.) The rehearing was denied, without opinion, and, therefore, the issue was not expressly passed on in the State court.

Arkansas procedure, which does not permit injection of a new issue upon petition for rehearing, will be briefed under Point 4.

Appellants' present efforts are similar in form to those of appellants in *Raley* v. *State of Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed. 2d 1344:

> " * * * In their notices of appeal to this Court, appellants have phrased some of their federal constitutional claims as attacks on the constitutionality

> of the Ohio statute authorizing the Commission and the statute providing for immunity. But this does not suffice: 'It is essential to our jurisdiction on appeal * * * that there be an explicit and timely insistence in the state courts that a state statute, as applied is repugnant to the federal Constitution, treaties or laws.' *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185, 65 S.Ct. 624, 627, 89 L.Ed. 857. * * * appellants have made no effort to support their burden of demonstrating an attack made by them on the validity of a state statute in the state court, and we have found none, accordingly the appeals are dismissed. * * * "
>
> 360 U.S. 423, 434-435, 79 S.Ct. 1257, 1264-1265.

In *Raley* certiorari was granted in view of the public importance of the constitutional questions which had been claimed in the Ohio courts.

In both cases cited by appellant as sustaining jurisdiction, *Baker* v. *Carr* and *Gray* v. *Sanders* and in the one decision in which this Court has assumed jurisdiction of a complaint against realignment of a city's boundaries, *Gomillion* v. *Lightfoot*, the parties challenging the statute did so in the trial court and proceeded with the federal question in all subsequent appeals.

The attempt to create a constitutional issue on petition for rehearing in the State court is not timely.

*Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed. 2d 1382 (rehearing denied 358 U.S. 858, 79 S. Ct. 10, 3 L.Ed. 92) held: "We need not determine whether Florida was bound to give full faith and credit to the decree of the Delaware Chancellor since the question was not seasonably presented to the Florida Court. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128, 65 S.Ct. 1475, 1480, 89 L.Ed. 2092." The footnote states:

> "The record discloses no mention of the state statute until the petition for rehearing in the Florida Supreme Court. * * * "
>
> 78 S. Ct. 1228, 1234; 357 U.S. 235, 243.

The failure of the Arkansas Court to entertain and decide appellants' constitutional argument on rehearing brings this appeal within the rule of *Herndon* v. *Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. [Citing cases.]
>
> " * * * There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. [Citing cases.] The whole point, therefore, is wheather the ruling here assailed should have been anticipated."
>
> 55 S. Ct. 794, 795; 295 U.S. 441, 443-444; 79 L.Ed. 1530.

The vigorous dissent of Mr. Justice Cardozo in the *Herndon* case was based upon the adoption by the Georgia Supreme Court of an interpretation of the statute contrary to that adopted at the trial.

> " * * * The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely. [Citing cases.]"

295 U.S. 441, 447, 55 S.Ct. 794, 796-797.

Appellants do not in their Jurisdictional Statement nor did they in their Petition for Rehearing claim surprise or other excuse for failure to raise the federal question in the trial court or their appellate brief. Since the federal question was not timely nor properly raised and was not expressly passed on in the State court, the appeal is not within the statutory jurisdiction of this Court.

4. *The Judgment Rests on an Adequate Non-Federal Basis.*

The Arkansas Supreme Court, without opinion, denied the petition for rehearing in which appellants had first raised the federal question.

The Arkansas Supreme Court has uniformly held that all issues which the appellant fails to argue in his original brief are waived or abandoned. *Johnson* v. *Gammill* (1959), 231 Ark. 1, 328 S.W. 2d 127, 131; and *Campbell* v. *Beaver Bayou Drainage Dist.* (1949), 215 Ark. 187, 219 S.W. 2d 934, 935, citing cases collected West's Arkansas Digest, Appeal & Error key no. 1078.

New issues may not be raised for the first time in the reply brief. *Groves* v. *Keene* (1912), 105 Ark. 40, 150 S.W. 575; *O'Dell* v. *Young* (1947), 210 Ark. 1073, 199 S.W. 2d 971.

Where a new issue is raised by appellant on rehearing, the Arkansas Court has held that, "*under our rules of practice, it will be deemed to have been waived and abandoned, and we cannot now consider it.*" *Vaughan* v. *Cooper* (1912), 103 Ark. 260, 146 S.W. 503, 504, emphasis added.

The indicated Arkansas procedure applies even though the issue may have been preserved by appellant in the trial court. In their Jurisdictional Statement appellants do not contend that the constitutional question was presented to the trial court but concede that it was raised for the first time on rehearing. (Jurisdictional Statement (d) p. 3.)

While *Matthews* v. *Bailey* (1939), 198 Ark. 830, 131 S.W. 2d 425, 428, contains dicta that constitutional questions may be raised for the first time on appeal, *Latham* v. *Hudson* (1956), 226 Ark. 673, 292 S.W. 2d 252, and *Scottish Union Ins. Co.* v. *Wilson* (1931), 183 Ark. 860, 39 S.W. 2d 303, hold that the constitutionality of a statute, not raised by appellant in the trial court, cannot be considered on appeal.

This is the same rule followed in *Jennings* v. *Illinois*, 342 U.S. 104, 72 S.Ct. 123, 126, 96 L.Ed. 119: "Where, as here, a federal claim can be raised at the trial, it may be forfeited by failure to make a timely assertion of the claim." (Citing *Yakus* v. *U.S.*, 1944, 321 U.S. 414 444, 64 S.Ct. 660, 677, 88 L.Ed. 834, and cases cited therein.)

If a State court entertains a motion for rehearing and decides in favor of the statute, even though such constitutional determination is erroneous, the decision rests upon an adequate and independent non-federal ground if the decision on rehearing also determines that the federal question had dropped out as a matter of procedure. *Radio Station WOW* v. *Johnson*, 1945, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092.

> " • • • Questions first presented to the highest State Court on a petition for rehearing come too late for consideration here, unless the State Court exerted its jurisdiction in such a way that the case

could have been brought here had the questions been raised prior to the original disposition. [Citing cases.] Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits.

"This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. * * * "

65 S.Ct. 1475, 1480; 326 U.S. 120, 128.

In order to contend that the denial of rehearing was solely upon the federal question, appellants must show that the Arkansas Supreme Court, without opinion, overruled its long line of procedural decisions on waiver and abandonment of issues which appellants fail to present in the trial court and in their original brief upon appeal.

Respectfully submitted,

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*For Appellee.*

# APPENDIX

In the Circuit Court of Jefferson County, Arkansas

In the Matter of Annexing to the City of Pine Bluff, Arkansas, Certain Territory Contiguous to the City of Pine Bluff, Arkansas — No. 15,680

## ORDER AND JUDGMENT OF ANNEXATION

On the 6th day of November, 1962, come on for hearing the appeal of W. S. Rogers, Ben C. Brantley and O. H. Hyde, individually and in their representative capacities, from the Order of Annexation entered March 12, 1962, in the County Court of Jefferson County, Arkansas, and the appeal of J. H. Primm from said Order of Annexation, the proceeding of said remonstrants to have such annexation prevented, and the Petition for Annexation of the City of Pine Bluff, Arkansas: said W. S. Rogers, Ben C. Brantley and O. H. Hyde appearing in person and by their attorney, Ward Martin; J. H. Primm appearing by his attorney, Lawrence Blackwell; the City of Pine Bluff, Arkansas, appearing by its city attorney, George N. Holmes, designated in said Petition for Annexation to act in behalf of petitioner in prosecuting said petition and proceedings based thereon, and by its special attorney, John Harris Jones; and all parties announced ready for trial. Said City tendered its amendment to delete from the petition the property owned by the South Arkansas Livestock, Inc., which are described in Deed Book 195 at page 132 of the records of Jefferson County, Arkansas; the objections of remonstrants to such amendment were sustained and leave denied to file such amendment; and said matters proceeded to trial upon the annexation of the territory described in the original Petition for Annexa-

tion filed November 20, 1961. On said 6th day of November, 1962, appellant and remonstrant J. H. Primm dismissed his appeal and proceeding to have the annexation prevented and withdrew from the case. The trial having been resumed from day to day, namely on November 7, November 8 and November 26, 1962, on November 26, 1962, the court after hearing and receiving all of the evidence and argument of counsel announced its findings and decision; and the court upon the evidence adduced by said City and by said remonstrants, oral and documentary, and including the stipulations of counsel, and being well and sufficiently advised both as to law and to fact, doth find:

1. The City of Pine Bluff, Arkansas, is a city of the first class located within Jefferson County, Arkansas.

2. The territory sought to be annexed to the City of Pine Bluff is all located within Jefferson County, Arkansas, and is contiguous to and adjoining said City of Pine Bluff.

3. The City Council of the City of Pine Bluff on September 25, 1961, duly passed Ordinance No. 3698 providing for the annexation to said City of Pine Bluff of the territory involved in this proceeding and for submitting the question of the annexation of the lands proposed to be annexed to the qualified voters of said City of Pine Bluff at the annual election on November 5, 1961; said Ordinance No. 3698 was duly passed and approved more than one month before the said annual election and was duly published for the time and in the manner required by law; that at the annual election on November 5, 1961, the qualified electors of the City of Pine Bluff voted for and approved the annexation of said lands by a vote of 897 for annexation and of 311 against annexation; that

the result of said election was duly certified as provided by law and the certification thereof by Garland Brewster as Chairman of the Jefferson County Board of Election Commissioners was duly filed in this proceeding.

4. On November 20, 1961, the Petition of said City of Pine Bluff praying for the annexation of the territory involved in this proceeding, naming George N. Holmes as its attorney and its agent to act in behalf of petitioner, City of Pine Bluff, Arkansas, was duly presented to the County Court of Jefferson County, Arkansas, which court at the time of such presentation fixed the 8th day of January, 1962, at 9:00 a.m. as the time for hearing on said petition and the Circuit courtroom in the Court House of Jefferson County, Arkansas, as the place thereof and communicated the same to the attorney of said petitioner and its agent named in said petition; that the time so fixed by the court was not less than thirty days after the filing of said petition; that the petitioner thereupon caused notice thereof to be published in the Pine Bluff Commercial, a newspaper of general circulation in Jefferson County, Arkansas, for three consecutive weeks before the time of such hearing, which notice contained the substance of said petition and stated the time and place appointed for the hearing thereof.

5. When said petition was presented to said County Court it was filed by the County Clerk of Jefferson County, Arkansas, on November 20, 1961, in the office of said Clerk; that from and after the filing of said petition, it and the map or plat annexed thereto were kept in the office of said County Clerk subject to the inspection of any person or persons interested until the time appointed for the hearing thereof.

6. That the County Court of Jefferson County, Arkansas, at the time and place appointed for the hearing thereof, did hear such matter in a public hearing on said petition, the map or plat filed therewith, proof of publication of said notice of hearing, and testimony and exhibits for the petitioner and for remonstrats appearing at the hearing; the testimony not having been completed on said date, the hearing was continued to February 8, 1962, and again on February 12, 1962. The protest of W. S. Rogers, Ben C. Brantley, O. H. Hyde and other landowners within the area proposed to be annexed was presented to the County Court. Said County Court found that the petition of said City of Pine Bluff for the annexation of said lands with an accurate map or plat thereof was duly filed in the office of the County Clerk, and notice of the hearing thereon duly published; that said Ordinance No. 3698 was duly passed and approved; that the vote of the qualified electors of said City of Pine Bluff voted for and approved the annexation of said lands and the results duly certified; and "that it is right a l proper that the lands which are described in said petition of the City of Pine Bluff, as amended, should be annexed to the said City of Pine Bluff, Arkansas; that all conditions and requirements for the annexation of said lands have been fulfilled and that the said petition, as amended, should be granted."

7. Said County Court of Jefferson County, Arkansas, by its Order of Annexation entered March 12, 1962, considered, ordered and adjudged that the lands described in the petition, with the exception therefrom of the land owned by The South Arkansas Livestock Show Association, "be and they are hereby annexed to and made a part of and included within the corporate boundaries of the City of Pine Bluff, Arkansas."

8. That said Order of Annexation of the County Court of Jefferson County, Arkansas, should be affirmed in all things, save and except its deletion from the petition of the lands owned by The South Arkansas Livestock Show Association. As to the Petition for Annexation, as filed and as now before this court, the findings and determination of annexation of the entire territory described in such petition should be affirmed.

9. That the territory sought to be annexed is already part of the Pine Bluff community in practice. All that remained to be done was annexation. The territory sought to be annexed is an out-growth of the City of Pine Bluff and has its interests in common with the City of Pine Bluff and after annexation will make up a homogeneous city.

10. That the territory sought to be annexed has been accurately described in the Petition for Annexation, and the map or plat filed with said petition is accurate.

11. That the City of Pine Bluff will be able to furnish municipal services as needed in the territory to be annexed. The departments of the City will furnish the services needed.

12. Most of the land sought to be annexed is already platted as additions to the City of Pine Bluff with plats on file in the Clerk's office. People sell the land as lots or hold it for sale as lots, and it is either divided or subject to be divided into lots.

13. The population in the area to be annexed is approximately 7,500. In what has been described in the testimony as area four or the Dew Drop area over 2,000 people now live which is more people than live in the county seats of Rison, Star City or Arkansas City.

14. The territory sought to be annexed is needed for proper town purposes, the extension of streets, sewer system, gas and water and to provide residences and the City's need for business expansion. Pine Bluff is expanding and expanding rather rapidly. The Chamber of Commerce is obtaining plots or options on plots for factories or shops or industries such as near the railroad in area 4. Not many people live in that tract but it is very valuable for business purposes.

15. The area sought to be annexed is very much in need of police regulation. The work of the Sheriff's office has been commendable, but it is too much to expect the seven deputies to cover all this territory and to call them out at all hours of the night to run them all over the city to provide protection which should properly be handled by a city police department. Large investments have been made in improvements in the land sought to be annexed, and the owners are in dire need of the police department.

16. The property values in the territory sought to be annexed show that the lands are valuable for city use or for adaptability for prospective town use rather than for use or adaptability for use for agricultural or horticultural purposes.

17. That no owner of land in the areas East and Southeast of Pine Bluff sought to be annexed now makes an objection to such annexation in this proceedinng, and none of the remonstrants appearing before this court makes any claim that his land is used or adaptable for use for agricultural or horticultural purposes.

18. It is right and proper in the judgment of this court that the territory described in the Petition for Annexation be annexed to the City of Pine Bluff, Arkansas; that the limits of the territory to be annexed have been accurately described in said petition and an accurate map thereof filed with said petition; and the prayer of the petitioner is right and proper: that the requirements for annexation have been complied with by the City of Pine Bluff in all respects in accordance with law; that the territory proposed to be annexed is not unreasonably large.

19. That the proceedings to prevent the annexation should be dismissed. The appeal from said County Court Order should be dismissed.

20. That all of the territory sought to be annexed is used for or adaptable to city uses and is needed for expansion for Pine Bluff's normal growth.

It is, therefore, by the court, considered, ordered, and adjudged that all complaints and protests against such annexation are hereby dismissed; that the proceedings to prevent the annexation are hereby dismissed; that the Order of Annexation entered March 12, 1962, by the County Court of Jefferson County, Arkansas, is hereby affirmed as modified herein by reinstating into the territory to be annexed the land owned by The South Arkansas Livestock Show Association which was and still is included in the Petition for Annexation; and that the lands hereinafter described, situated in Jefferson County, Arkansas, are hereby annexed to and made a part of and included within the corporate boundaries of the City of Pine Bluff, Arkansas, to-wit:

[Description omitted.]

And, it is, further considered, ordered and adjudged by the court that unless Notice of Appeal be filed within thirty days from the entry of this Order and Judgment, the territory and lands described above shall, in law, be deemed and taken to be included in and shall be a part of the City of Pine Bluff, Arkansas, and the inhabitants of said territory shall, in all respect, be citizens thereafter of said municipal corporation, and the clerk shall make out and certify to the City Council of the City of Pine Bluff and the Secretary of State of the State of Arkansas the transcripts provided for by law.

Entered this 30th day of November, 1962.

/s/ Henry W. Smith

Circuit Judge